10-16-2013

Bybee v. Gorman Respondent's Brief Dckt. 40887

IN THE SUPREME COURT OF THE STATE OF IDAHO

SCOTT and MERI BYBEE, husband and wife,

Plaintiffs/Appellants,

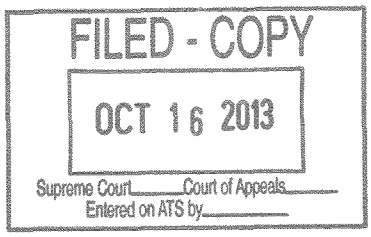
vs.

PATRICK D. GORMAN, M.D., and FRED MEYER PHARMACY, FRED MEYER STORES, INC., and JOHN DOE PERSONS I through V,

Defendants/Respondents.

Case No. CV-2011-2156

Docket No. 40887



RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Bonneville

HONORABLE DARREN B. SIMPSON, District Judge

Attorney for Appellant

G. Lance Nalder
NALDER LAW OFFICE, P.C.
591 Park Avenue, Suite 201
Idaho Falls, ID 83402
Telephone: (208) 542-0525
Fax: (208) 542-1002

Attorneys for Respondent

Terrence S. Jones
Erin C. Pittenger
QUANE JONES McCOLL, PLLC
101 South Capitol Boulevard, Suite 1601
Boise, ID 83701
Telephone: (208) 780-3939
Fax: (208) 780-3930

IN THE SUPREME COURT OF THE STATE OF IDAHO

SCOTT and MERI BYBEE, husband and wife, Plaintiffs/Appellants, vs. PATRICK D. GORMAN, M.D., and FRED MEYER PHARMACY, FRED MEYER STORES, INC., and JOHN DOE PERSONS I through V, Defendants/Respondents.	Case No. CV-2011-2156 Docket No. 40887

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho in and for the County of Bonneville

HONORABLE DARREN B. SIMPSON, District Judge

Attorney for Appellant

G. Lance Nalder
NALDER LAW OFFICE, P.C.
591 Park Avenue, Suite 201
Idaho Falls, ID 83402
Telephone: (208) 542-0525
Fax: (208) 542-1002

Attorneys for Respondent

Terrence S. Jones
Erin C. Pittenger
QUANE JONES McCOLL, PLLC
101 South Capitol Boulevard, Suite 1601
Boise, ID 83701
Telephone: (208) 780-3939
Fax: (208) 780-3930

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Rules

I.

Statement of the Case

A. Nature of the Case

This is a medical malpractice case involving allegations asserted by Plaintiffs/Appellants Scott and Meri Bybee (hereinafter the "Bybees") after Scott Bybee failed to return for follow-up care as instructed. The Bybees appeal the January 19, 2013 summary judgment decision of the Honorable Darren B. Simpson, wherein he granted the Defendant/Respondent Patrick D. Gorman, M.D.'s (hereinafter "Dr. Gorman") motion for summary judgment. Dr. Gorman contends that the decision of the district court should be affirmed since the affidavits filed by the Bybees' expert, Dr. Jeffrey Osborn, failed to meet the admissibility requirements of Idaho Rule of Civil Procedure 56(e) and Idaho Code §§ 6-1012 and 6-1013 and therefore failed to create an issue of fact.

B. Course of Proceedings

The Bybees filed their Complaint and Demand for Jury Trial on April 11, 2011. R. Vol. I, p. 8-18. The Honorable Joel E. Tingey disqualified himself on April 16, 2012. *Id.* at 33. On or about May 11, 2013, the Honorable Dane Watkins was assigned to the case. *Id.* at 35-38. After the parties had been deposed, followed by several months of inactivity, Dr. Gorman filed his Motion for Summary Judgment on August 13, 2012. *Id.* at 42. The Bybees received notice that

the motion would be heard almost three months later on November 7, 2012. R. Vol. II, p. 407. Per Judge Watkins' scheduling order, the Bybees' Rule 26(b)(4) expert witness disclosure setting forth the opinions of their experts was due by or before October 30, 2012. R. Vol. I, p. 35.

On October 24, 2012, the Bybees filed their memorandum in opposition to Dr. Gorman's motion for summary judgment. *Id.* at 63-75. Plaintiffs' response included the submission of an affidavit from their lone expert, Dr. Jeffrey Osborn. *Id.* at 76-81. Dr. Osborn's affidavit states in relevant part:

> 1. My name is Dr. Jeffrey Osborn. I am a cardiologist, board certified, with licenses to practice in both Idaho and Utah. I have maintained a cardiology practice in eastern Idaho, where I have served patients from all cities located therein, including Idaho Falls and Pocatello. I have been licensed to practice medicine in Idaho since 2005 and am familiar with the standard of care applicable to cardiologists in the Idaho Falls/Pocatello area as it existed during 2007 through 2009, the time frame in which Mr. Scott Bybee was seen and treated by Dr. Patrick D. Gorman.

Id. at 77, ¶ 1. In his reply brief filed on October 31, 2012, Dr. Gorman argued: 1) Dr. Osborn's affidavit was inadmissible because it failed to comply with the foundational requirements of Rule 56(e) and Idaho Code §§ 6-1012 and 6-1013 and 2) Dr. Osborn's affidavit failed to address the issue of causation. *Id.* at 196-215. As a result of these deficiencies, Dr. Gorman argued that the Bybees were unable to establish a genuine issue of fact required to defeat the pending motion for summary judgment. *Id.*

On November 5, 2012, just two days before the hearing on the motion for summary judgment, the Bybees moved to continue summary judgment or in the alternative, for leave to supplement Dr. Osborn's affidavit. *Id.* at 216. The Bybees argued, in part, that the hearing on the motion should be continued or they should be granted leave to supplement Dr. Osborn's affidavit "[b]ecause Defendant Dr. Gorman has expressed his desire to depose Dr. Osborn, and [because] the timing of the current Motion for Summary Judgment has dissected the expert witness disclosure deadlines imposed on the plaintiffs by the Courts." *Id.* at 218-219, ¶ 9.

Counsel for Dr. Gorman traveled from Boise to Idaho Falls for the hearing on the motions set for November 7, 2012. At the start of the hearing, the Bybees' counsel stated for the first time that one of the plaintiffs, Meri Bybee, had previously worked with Judge Watkins approximately two years prior and they were concerned about a potential conflict of interest. After discussing the matter, and despite the fact that Judge Watkins had little to no memory of Meri Bybee, out of an abundance of caution, Judge Watkins elected to recuse himself for the case. R. Vol. II, p. 226. The case was then reassigned to the Honorable Darren Simpson after which Dr. Gorman's motion was re-noticed for hearing on November 28, 2012. *Id.* at 407.

On November 16, 2012, the Bybees submitted an untimely supplemental affidavit of Dr. Osborn in opposition to the defense motion. *Id.* at 228. Dr. Osborn's supplemental affidavit stated, in relevant part:

> 2. I have maintained a cardiology practice in Pocatello, Idaho where I saw and served patients from both Idaho Falls and

> Pocatello. I maintained this practice during the time period from 2007 through 2009, the time frame in which Mr. Scott Bybee was being treated by Dr. Patrick Gorman.
>
> 3. In this practice, I saw patients from both Idaho Falls and Pocatello. I understand from conversations with other cardiologists who practice in Idaho Falls that they would also see patients from Idaho Falls and Pocatello. The community, in terms of the area served by EIRMC hospital in Idaho Falls, consisted of people from both Idaho Falls and Pocatello.
>
> 4. I have spoken with a board certified cardiologist who maintained a clinical practice in Idaho Falls, Idaho during the 2007-2009 time frame about the standard of care in prescribing Amiodarone in Idaho Falls and Pocatello. From my conversations and my own clinical practice in Pocatello during that time frame, I am familiar with the standard of care for cardiologists in prescribing Amiodarone in both Idaho Falls as well as Pocatello.
>
> 5. The standard of care in the prescription and use of the drug Amiodarone/Pacerone was the same in Idaho Falls as it was in Pocatello during 2007-2009 and in fact was the same in Salt Lake and other area[s] that I have practiced in. It is a national standard of care. There are no local deviations in Idaho Falls or in Pocatello regarding Amiodarone, its thoughtful prescription, careful monitored use, and use in patient care.

Id. at 229-230, ¶¶ 2-5.

On November 28, 2012 counsel for Dr. Gorman again traveled from Boise to Idaho Falls to attend the rescheduled hearing on the motion for summary judgment. Upon arrival for the hearing, the parties learned that the Honorable Gregory Anderson would be covering the motion hearing docket for Judge Simpson that day due to Judge Simpson presiding over a trial in another matter. At the outset of the hearing, the Bybees' counsel objected to Judge Anderson hearing the

summary judgment motion and orally moved to disqualify Judge Anderson without cause pursuant to Rule 40(d)(1). *Id.* at 244.

Due to Judge Anderson's disqualification, the defense motion was reset for a third time, now to be heard on January 2, 2013. *Id.* at 407. On December 4, 2012 the Bybees filed a motion for the court to consider additional expert affidavits, or in the alternative, an amended motion to continue summary judgment pursuant to I.R.C.P 56(f). *Id.* at 246. On December 14, 2012 the Bybees' submitted the affidavit of the viewing pathologist Matt Tannenbaum, M.D. *Id.* at 250. On December 18, 2012, Dr. Gorman filed a Motion to Strike the Supplemental Affidavit of Jeffrey Osborn, M.D. and the Affidavit of Matt Tannenbaum, M.D. and opposed the Bybees' Motion to Consider Additional Affidavits and/or to further continue summary judgment under I.R.C.P. 56(f). *Id.* at 290-304, 306-308. On December 19, 2012 the Bybees filed a third Affidavit from Dr. Osborn. *Id.* at 256-259.

Over nineteen months after the complaint had been filed, on January 2, 2013, Dr. Gorman's Motion for Summary Judgment and his Motion to Strike were heard by Judge Simpson. *Id.* at 405. After oral argument, the court took the matter under advisement and subsequently issued a written decision on February 19, 2013. The court denied the defense motions to strike, considered the supplemental affidavits of Plaintiff's experts, and granted Dr. Gorman's Motion for Summary Judgment. *Id.* at 404-420. Judge Simpson reasoned that Dr. Osborn's affidavits lacked foundation and therefore did not support his conclusion that he had actual knowledge of the

local standard of practice for Dr. Gorman in Idaho Falls. *Id.* at 414-418. The Bybees thereafter field a Notice of Appeal. *Id.* at 423.

C. Statement of Facts

Dr. Patrick Gorman is a board certified cardiologist practicing in Idaho Falls, Idaho where he has practiced for over ten years. R. Vol. I, p. 53. Dr. Gorman first saw Scott Bybee (hereinafter "the patient") on May 9, 2007, at which point the patient reported a history of paroxysmal atrial fibrillation following a back surgery procedure earlier that year in Boise. *Id.* at 61-62. Options were discussed with the patient to consider cardiac catheterization and/or proceed with medical therapy as a means to control his heart rhythm. *Id.* The patient did not return to see Dr. Gorman again until August 16, 2007, at which point he presented with increasing complaints of atrial fibrillation symptoms. *Id.* at 59-60. The patient was scheduled for a left heart catheterization and was placed on the heart rhythm medication, Amiodarone. *Id.*

As a result of the catheterization procedure, the patient was found to have borderline two vessel coronary artery disease in addition to his other pre-existing health problems which included atrial fibrillation, hyperlipidemia, GERD and chronic back pain. *Id.* at 135-136. Following the surgical procedure, the patient returned to see Dr. Gorman on September 7, 2007. *Id.* at 57-58. The patient's dosage of Amiodarone was changed from one 200 m.g. tablet twice a day to one 200 m.g. tablet once a day with the option of taking the medication twice a day if needed for breakthrough symptoms. *Id.* It is documented that the patient was specifically instructed to

return to the clinic in six months or as needed with routine lab work performed prior to the visit. *Id.*

The patient never returned in six months as ordered by Dr. Gorman, nor did the patient ever obtain the laboratory testing that Dr. Gorman had ordered the patient to do. *Id.* at 166, Dep. p. 123-124, p. 169, Dep. p. 147. Instead, the patient elected to simply continue refilling his prescription for Amiodarone until he was unable to obtain any further refills of his medication. *Id.* In January 2010, the patient was diagnosed with thyroid complications which he alleges were caused by his prolonged use of Amiodarone. *Id.* at 11. The patient ultimately underwent removal of his thyroid for which the patient now seeks damages for from Dr. Gorman. *Id.* Dr. Gorman denies that he violated the standard of practice applicable to him or that his care and treatment resulted in the patient losing his thyroid. *Id.* at 20, 53-54.

II.

ISSUES PRESENTED ON APPEAL

A. Did the district court abuse its discretion in determining that Dr. Osborn's affidavit lacked foundation, was inadmissible and therefore failed to create an issue of fact?

1. Did the district court properly conclude that under the facts of this case the term "community" as defined under Idaho Code § 6-1012 was Idaho Falls, Idaho?

2. Did the district court abuse its discretion in determining that Plaintiffs' expert, Dr. Osborn, who did not practice medicine in Idaho Falls, Idaho, was an out-of-area expert for purposes of Idaho Code §6-1012?

3. **Did the district court abuse its discretion in determining that as an out-of area expert, Dr. Osborn's affidavit demonstrated that he had failed to adequately familiarize himself with the standard of practice applicable to Dr. Gorman in Idaho Falls, Idaho such that his affidavits were inadmissible?**

III.

ADDITIONAL ISSUE PRESENTED ON APPEAL

A. **Is Respondent entitled to attorney fees on appeal pursuant to Idaho Code § 12-121 and I.A.R. 41(a) due to Appellants' failure to identify any misapplication of the law and/or abuse of discretion by the district court?**

IV.

STANDARD OF REVIEW

In an appeal from an order granting summary judgment, the Appellate Court's standard of review is the same standard used by the district court in ruling on a motion for summary judgment. *See Edmunds v. Kraner*, 142 Idaho 867, 871, 136 P.3d 338, 342 (2006); *see also U.S. Bank Nat. Ass'n v. Kuenzli*, 134 Idaho 222, 225, 999 P.2d 877, 880 (2000); *see also First Sec. Bank v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law summary judgment is proper." *Edmunds*, 142 Idaho at 871, 136 P.3d at 342 (citation omitted).

Summary judgment is "not a disfavored procedural shortcut;" rather, it is the "principal ... tool by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Paugh v. Ottman*, 2008 WL 2704561, *4 (D. Idaho July 3, 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 377 (1986) (alterations in original)). In evaluating the sufficiency of the materials submitted in opposition to summary judgment, the Court must bear in mind the distinction between the requirements for admissibility of expert opinion testimony under Idaho Rule of Civil Procedure 56(e) and the test for sufficiency of such testimony in order to oppose a motion for summary judgment.

The liberal construction and reasonable inferences standard does not apply when deciding whether or not testimony offered in connection with a motion for summary judgment is admissible. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997); *Rhodehouse v. Stutts,* 125 Idaho 208, 868 P.2d 1224 (1994). The trial court must look at the witness' affidavit or deposition testimony and determine whether it alleges facts which, if taken as true, would render the testimony of that witness admissible. *Rhodehouse v. Stutts,* 125 Idaho 208, 868 P.2d 1224 (1994). The "admissibility of affidavits under Idaho Rule of Civil Procedure 56(e) is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment." *Edmunds*, 142 Idaho at 871, 136 P.3d at 342 (citation omitted).

This Court reviews challenges to the trial court's evidentiary rulings under the abuse of discretion standard. *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000); *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163–64, 45 P.3d 816, 819–20 (2002); *see also Hall v. Rocky Mountain Emergency Physicians, LLC*, 39473, 2013 WL 4768310 (Idaho Sept. 6, 2013. "To determine whether the trial court has abused its discretion, we consider whether it correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with legal standards, and whether it reached its discretion by an exercise of reason." *Shane v. Blair*, 139 Idaho 126, 128-129, 75 P.3d 180, 182-182 (2003) (citing *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.3d 993, 1000 (1991)).

V.

ARGUMENT

A. Rule 56(e) and Idaho Code § 6-1012 and 1013 set forth the requirements to be considered and evaluated by the district court when ruling on a defense motion for summary judgment in a medical malpractice case.

It is well settled that in order to avoid summary judgment in a medical malpractice action "a plaintiff must provide expert testimony that the defendant doctor, or other health care provider, 'negligently failed to meet the applicable standard of health care practice.'" *Suhadolnik v. Pressman,* 151 Idaho 110, 115, 254 P.3d 11, 16 (2011) (quoting *Dulaney v. St. Alphonsus Reg'l Med. Ctr.,* 137 Idaho 160, 164, 45 P.3d 816, 820 (2002)). "The applicable standard of care must be specific to the issues of care involved in the particular case." *Suhadolnik*, 151 Idaho at 123,

254 P.3d at 24. "The standard of care is simply the care typically provided under similar circumstances by the relevant type of health care provider in the community at the time and place of the alleged negligent act." *Shane v. Blair*, 139 Idaho 126, 130, 75 P.3d 180, 184 (2003).

Expert testimony is only admissible if it meets the foundational requirements of Idaho Code § 6–1013.[1] *Dulaney,* 137 Idaho at 164, 45 P.3d at 820. The expert's testimony must establish:

> (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with a reasonable degree of medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed....

I.C. § 6–1013. Idaho Rule of Civil Procedure 56(e) imposes additional requirements on expert testimony offered in a medical malpractice action.

> The party offering such evidence must show that it is based upon the witness' personal knowledge and that it sets forth facts as would be admissible in evidence. The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or

---

1 Idaho Code § 6-1013 provides: Testimony of expert witness on community standard. The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing himself with the standards and practices of (a particular) such area and thereafter giving opinion testimony in such a trial.

> speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e).

Dulaney, 137 Idaho at 164, 45 P.3d at 820 (citations omitted).

Idaho Code § 6-1012 defines the relevant community which is "is both cite and time specific." *Ramos v. Dixon*, 156 Idaho 32, 37, 156 P.3d 533, 538 (2007) (quoting *Gubler v. Boe*, 120 Idaho 294, 296, 815 P.3d 1034, 1036 (1991)). Additionally, Idaho Code § 6-1013 "requires actual knowledge of the standard of care in the community where the alleged malpractice occurred." *Morris By & Through Morris v. Thompson*, 130 Idaho 138, 146, 937 P.2d 1212, 1220 (1997). As will be analyzed in detail below, the district court properly ruled that Dr. Osborn's affidavits were inadmissible due to foundational deficiencies not in compliance with the requirements of Rule 56(e) and Idaho Code §§ 6-1012 and 6-1013. As these issues were properly analyzed by Judge Simpson, this court should affirm his decision to grant summary judgment in all respects.

1. The District Court correctly concluded that the appropriate "community" per Idaho Code § 6-1012 was Idaho Falls, Idaho.

The Bybees did not provide the court with evidence sufficient to create a factual issue regarding the determination of whether the term "community" per Idaho Code §6-1012 should be interpreted as being broader than Idaho Falls, Idaho. [2] Under the statute, the applicable

---

2 Idaho Code § 6-1012 provides: Proof of community standard of health care practice in malpractice case. In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist,

standard of health care practice to which the defendant health care provider is held, is that practiced in "the community in which such care allegedly was or should have been provided." I.C. § 6–1012. The statute goes on to define the term "community" as referring to "**that geographical area ordinarily served** by the licensed general hospital **at or nearest to which such care was or allegedly should have been provided.**" *Id.* (emphasis added).

With this statutory definition as a guide, we start first with identifying where the challenged medical care was provided. Under the facts of this case, it is undisputed that the medical care at issue was rendered to the patient solely in the community of Idaho Falls. *See* R. Vol. I, p. 53, ¶ 3. Per Idaho Code §6-1012, the next question is where is the "licensed general hospital at or nearest" to Idaho Falls, Idaho. It is equally without question that said hospitals would be either Eastern Idaho Regional Medical Center ("EIRMC") or Mountain View Hospital ("MVH") both of which are located in Idaho Falls. R. Vol. II, p. 416. Thus, Dr. Gorman takes

---

hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.

the position that the term "community" in this case per Idaho Code § 6-1012 is Idaho Falls, not Blackfoot or Pocatello or some greater undefined area of "Eastern Idaho" as the Bybees assert.

Despite the forgoing plain language of the statute, the Bybees creatively assert on appeal that a factual issue exists as to whether the term "community" under Idaho Code § 6-1012, should be defined more broadly to include the entire catchment area from which the potential patient's for a licensed general hospital may come from, rather than the physical location where the medical care was actually rendered. *See* Appellants' Br., p. 12-17. This argument is advanced despite the fact that this Court has already made it clear that no uniform standard of health care practice is to be presumed within the state of Idaho. *E.g., Ramos*, 144 Idaho at 38, 156 P.3d at 539.

In support of this issue, the Bybees favorably cite to the case of *Ramos v. Dixon,* 144 Idaho 32, 156 P.3d 533. *Ramos* involved a claim for medical malpractice brought by a patient's heir against the former primary care provider, a general practitioner, Dr. Gordon Dixon who practiced medicine in Blackfoot, Idaho. *Id.* at 33, 156 P.3d at 534. Ramos died following an episode of cardiac arrest. In support of the claim, the decedent's heir retained Dr. Richter, a cardiologist from New Jersey who opined that Dr. Dixon had violated the applicable standard of practice. *Id.* at 34, 156 P.3d at 535. As an out-of-area expert, for purposes of familiarizing himself with the local standard of practice applicable to Dr. Dixon, Dr. Richter communicated with an Idaho Falls family practitioner, Dr. Shawn Spiers. *Id.*

Dr. Dixon moved for summary judgment, arguing in part, that the plaintiff's expert had failed to adequately familiarize himself with the applicable standard of practice for Blackfoot, Idaho. *Id.* Focusing on the term "community," the *Ramos* Court cited the above language from Idaho Code §6-1012, noting the care had been rendered in Blackfoot and found the nearest licensed general hospital was Bingham Memorial Hospital which was also located in Blackfoot. *See id.* at 36, 156 P.3d at 537. Plaintiff's familiarizing expert, Dr. Spiers did not practice in Blackfoot, but rather Idaho Falls. *Id.*

The *Ramos* Court noted there was "no evidence in the record" as to "whether Idaho Falls is within the geographical area ordinarily served by the hospital in Blackfoot." *Id.* Further, the record was without sufficient evidence to show that the familiarizing expert, Dr. Spiers had any knowledge of the standard of practice in Blackfoot despite the fact that Dr. Spiers stated in his affidavit that he had some prior undefined, experience working in Blackfoot. *Id.* Concluding the foundation for Dr. Richter's opinions was lacking, the Court found that Dr. Richter was unable to explain the nature of Dr. Spiers experience in Blackfoot, nor did he know what the time frame was when Dr. Spiers had this work experience so as to determine if it could be related to the time period at issue in the case. *Id.* at 38, 156 P.3d at 539.

Plaintiff attempted to avoid the argument by claiming that she did not have the obligation of laying a foundation that the familiarizing physician, Dr. Spiers, actually had knowledge of the applicable standard as it existed in Blackfoot in 2003. *Id.* at 37, 156 P.3d at 538.

Plaintiff argued instead that Dr. Spiers conclusory statement in his affidavit simply stating that he was familiar with the standard applicable in Blackfoot was sufficient to shift the burden to the defense to prove Dr. Spiers did not have such knowledge. *Id.* The Court in *Ramos* disagreed. Citing *Dulaney*, the Court reaffirmed that:

> The liberal construction and reasonable inferences standard [applicable to summary judgment] does not apply ... when deciding whether or not testimony offered in connection with a motion for summary judgment is admissible.... The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e). The Plaintiff had the obligation to lay an adequate foundation for Dr. Richter's opinion.

Ramos, 144 Idaho at 37, 156 P.3d at 538 (citing *Dulaney*, 137 Idaho at 163–164, 45 P.3d at 819–820) (internal quotation omitted).

The *Ramos* Court further stated that "how an expert becomes familiar with that standard of care is a legal issue, not a medical one . . . The attorney must be directly involved in advising the expert as to how to learn the applicable standard of care and in determining whether the expert has done so." 144 Idaho at 37, 156 P.3d at 538. Finding that the plaintiff's counsel had not made any attempt to determine whether Dr. Spiers had knowledge of the standards applicable in Blackfoot, and if so, how he gained that knowledge, the Court concluded the district court did not abuse its discretion in concluding that Dr. Richter did not lay an adequate foundation

for his opinion. As a result, the *Ramos* Court affirmed summary judgment. *Id.* at 38, 156 P.3d at 539.

Applying *Ramos* to the facts of this case similarly demonstrates that the district court acted within the bounds of its discretion by concluding that the Bybees' counsel failed to properly prepare and educate his out-of-area expert, Dr. Osborn, and to lay a proper foundation. To try and avoid this fatal flaw, the Bybees have advanced a creative argument seeking to expand upon the meaning of the term "community." This court should decline to jump into such an ill-defined thicket from which nothing but further appellate litigation in virtually all medical malpractice cases would almost certainly flow. Thankfully, this unknown realm can again be avoided as was similarly concluded in *Ramos* since a review of the record here demonstrates that it, too, is equally devoid of any admissible evidence that Pocatello "is within the geographical area ordinarily served by" EIRMC or MVH. *Id.* at 35, 156 P.3d at 536.

The Bybees cite with favor the statement by Dr. Osborn in his supplemental affidavit wherein he states: "the community, in terms of the area served by EIRMC hospital in Idaho Falls, consisted of people from both Idaho Falls and Pocatello." R. Vol. II, p. 229, ¶ 3. Dr. Gorman contends that simply stating as Dr. Osborn does, that EIRMC receives patients from both Idaho Falls and Pocatello does not create an issue of fact as to whether the term "community" under Idaho Code §6-1012 includes an area larger than Idaho Falls. Like the nearly identical conclusory statements rejected in the affidavit of Dr. Spiers in *Ramos*, because Dr. Osborn is not

from Idaho Falls, he has never worked in Idaho Falls and therefore never worked at EIRMC or MVH, there is absolutely no foundational basis contained anywhere in any of his affidavits to support the above conclusory statement he advances.

In considering this assertion, the district court noted:

> Taken as true for purposes of summary judgment, the fact that EIRMC serves patients from throughout the region does not alter the requirement that the Bybees must produce direct expert testimony of the applicable standard of health care practice of the community in which such care allegedly was or should have been provided. (citing to *Coombs v. Curnow*, 148 Idaho 129, 219 P.3d 453 (2009)).

R. Vol. II, p. 416. The district court further stated, "[t]o hold otherwise would nullify the definition of 'community' provided by the Idaho Legislature in Idaho Code § 6-1012." *Id.* Dr. Gorman contends that the district court correctly determined that the "community" in question is Idaho Falls, Idaho and not Pocatello, Idaho. Similarly, the statements Dr. Osborn advances regarding his conversations with a secret consultant do not demonstrate that he ever asked this unknown physician any questions about the nature of the catchment area or community ordinarily served by EIRMC or MVH. Indeed, it would be difficult to see how a physician would be able to advance such a foundational statement about an entire population of patients rather than obtaining such information from someone like the hospital administrator for EIRMC or MVH.

Consequently, Dr. Gorman contends that Dr. Osborn's statement cannot be relied upon, as the Bybees assert, to create an issue of fact regarding whether the community in question applicable to Dr. Gorman also includes a larger undefined area of Eastern Idaho which somehow

includes the city of Pocatello. Moreover, the definition of the term "community" under Idaho Code §6-1012 includes the words "ordinarily served" which must be given their ordinary meaning as well. Dr. Gorman contends that on its face the words "ordinarily served" means that even if some of the hospital's patients came from another community, this would not change the determination of the appropriate local community to which the defendant health care provider's medical care is to be judged under Idaho Code §6-1012. Again, the statute speaks in terms of local "community" and not an entire "region" of the state. Similarly, advancing his personal opinion, as the Bybees' counsel did during oral argument on summary judgment "that 38 percent" of Eastern Idaho Regional Medical Center's patients allegedly come from outside of Bonneville County, is not evidence. *See* Tr. Vol. I, p. 29, L. 18-24.

Finally, this Court previously addressed the very question of whether the applicable standard of health care practice is the same for Pocatello and Idaho Falls, and found that it is not. *See Gubler v. Boe*, 120 Idaho 294, 815 P.2d 1034 (1991) (upholding the trial court's decision to exclude plaintiff's expert witness testimony where the expert had not familiarized himself with the community standard of health care practice in Pocatello, as he had spoken only with a doctor practicing in Idaho Falls). While the communities at issue in the present case are reversed, the *Gubler* decision establishes that Idaho Falls and Pocatello are, in fact, two distinct communities under the court's previous interpretation of Idaho Code § 6-1012, despite the Bybees' attempt to convert them both into the same community at this point.

Dr. Osborn's testimony that "[t]he community, in terms of the area served by EIRMC hospital in Idaho Falls, consisted of people from both Idaho Falls and Pocatello," does not change the fact that both EIRMC and MVH are located *in* Idaho Falls. R. Vol. II, p. 229, ¶ 3. The district court correctly held that the "community" at issue is Idaho Falls. *Id.* at 416. In making this determination, the district court reasonably observed that, "[t]o hold otherwise would nullify the definition of 'community' provided by the Idaho Legislature in Idaho Code § 6-1012." *Id.* Dr. Gorman contends that the district court correctly determined that the "community" in question in this case is Idaho Falls and not some larger undefined area of eastern Idaho which may or may not include all smaller communities who have some citizens who also happen to seek treatment from EIRMC or MVH.

2. Based on the statutory definition of "community," the district court did not abuse its discretion in determining that Dr. Osborn was an out-of-area expert.

The Idaho Legislature has imposed the requirement that a Plaintiff, must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician. *See* I.C. § 6–1012. "Health care providers are to be judged in comparison with similarly trained and qualified providers of the same class in the same

community." *Dekker v. Magic Valley Regional Medical Center*, 115 Idaho 332, 334, 766 P.2d 1213, 1215 (1988).

Under the facts of this case, Dr. Osborn's affidavits demonstrate the following: 1) that Dr. Osborn has never practiced medicine in Idaho Falls, Idaho; 2) any treatment Dr. Osborn rendered to patients who may have resided in the Idaho Falls area did not take place in Idaho Falls, but rather Pocatello or Utah; 3) because Dr. Osborn has never worked in Idaho Falls, he is not personally familiar with the standard of health care practice as it existed in Idaho Falls, Idaho from 2007-2009; 4) Dr. Osborn has done nothing to determine whether the community ordinarily served by the hospitals in Idaho Falls, namely EIRMC or MVH, included the area of Pocatello; and 5) due to a lack of knowledge of Idaho Falls, Dr. Osborn allegedly spoke with a secret or anonymous consultant physician in an attempt to obtain knowledge regarding the standard of practice applicable to Dr. Gorman. R. Vol, II, p. 228-231, 256-264.

In an attempt to get around the fact that he has never practiced medicine in Idaho Falls, Dr. Osborn states in his first affidavit that he has been licensed in the state of Idaho since 2005 and is therefore familiar with the standard of practice because he maintained a cardiology practice in eastern Idaho, "serv[ing] patients located therein, including Idaho Falls and Pocatello." R. Vol. I, p. 77, ¶ 1. After being challenged in Dr. Gorman's reply brief that the language in the first affidavit fails to demonstrate actual knowledge of the Idaho Falls standard of practice in 2007 to 2009, Dr. Osborn submitted a second affidavit which takes a different tack. *Id.* at 196-215. In

his second affidavit, Dr. Osborn admits that his Idaho cardiology practice was only in Pocatello, Idaho between 2007-2009, but that he also cared for patients who resided in both Idaho Falls and Pocatello. R. Vol. I, p. 219 ¶2. On this basis, the district court correctly concluded that Dr. Osborn's testimony provided the "necessary substantiation that Osborn familiarized himself with the standard of care in the Pocatello medical community." R. Vol. II, p. 415.

However, because the community in question is Idaho Falls and not Pocatello, this meant that Dr. Osborn was an out-of-area expert whose affidavit testimony was insufficient to demonstrate that he was familiar with the actual local standard of health care practice applicable to Dr. Gorman as a cardiologist practicing in Idaho Falls. *Id.* As outlined above, the relevant community per Idaho Code § 6-1012 is "both site and time specific" in addition to which this Court has made it clear that no uniform standard of health care practice can be assumed within the state of Idaho. *See Ramos*, 144 Idaho at 37, 156 P.3d at 538. In light of this, there was no disputed issue of fact before the district court as to whether Dr. Osborn was an out-of-area expert. Indeed, the Bybees' actions concede they knew Dr. Osborn did not qualify as a local expert or else they would not have sought to have him consult with a local specialist as they did. R. Vol. II, p. 229.

3. The district court did not abuse its discretion in determining that Dr. Osborn failed to familiarize himself with the standard of practice applicable to Dr. Gorman in Idaho Falls, Idaho from 2007-2009.

Continuing with the premise that Idaho Falls is the community in question with Dr. Osborn being an out-of-area consultant, in order for Dr. Osborn's opinions against Dr. Gorman to be admissible he was required to demonstrate – by setting forth "facts as would be admissible in evidence," that he has taken affirmative steps to acquire actual knowledge of the 2007-2009 Idaho Falls standard of health care practice applicable to Dr. Gorman. *See* I.R.C.P. 56(e); *see also* I.C. § 6-1013(1)(c). In an attempt to comply with these requirements, Dr. Osborn states in his second affidavit that he had "spoken with a board certified cardiologist who maintained a clinical practice in Idaho Falls, Idaho during the 2007-2009 time frame about the standard of care in prescribing Amiodarone in Idaho Falls and Pocatello." R. Vol. II, p. 229, ¶ 4. There are no further references or details, however, regarding this anonymous cardiologist or what was discussed regarding the "standards for prescribing Amiodarone." *Id.*

At this juncture, the remaining issues before this Court are: 1) whether in Idaho the use of a secret consultant is a permissible way for an out-of-area expert to familiarize himself with the local standard of practice; and if so, 2) whether the limited description of what Dr. Osborn allegedly discussed with the secret consultant as set forth in Dr. Osborn's second affidavit is enough to lay an adequate foundation for his conclusion that he has actual knowledge sufficient to familiarize himself with the local standard of practice applicable to Dr. Gorman. Dr. Gorman contends the answer to both these questions is in the negative and that this Court has already

impliedly and/or expressly ruled as much in several prior decisions interpreting both Rule 56(e) and Idaho Code §§ 6-1012 and 1013.

We start with whether a secret or anonymous consultant can be relied upon to satisfy the foundational requirements of the above rules and statutes. Dr. Gorman contends that to allow the use of a secret or anonymous physician consultant amounts to allowing a Plaintiff to create the foundation for an expert's opinions by way of a self-fulfilling prophecy. It would be similar to Dr. Osborn stating that he has actual knowledge of the standard applicable to Dr. Gorman by virtue of the fact that "one who shall not be named said it to be so." The defense contends that one would have to engage in pure legal fiction in order to conclude that an unknown consultant with unknown experience and unknown credentials could lay a permissible foundation to satisfy the requirements of Idaho Code § 6-1013 and Rule 56(e).

a. The *Dulaney* Case.

The suggestion of an anonymous consultant first appeared in the case of *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 45 P.3d 816 (2002). *Dulaney* involved the claims of Anna Dulaney who, in 1994, suffered a fall at a relative's home and was taken in to the ER at St. Alphonsus Regional Medical Center, evaluated and released. The patient later returned to the ER with complaints of weak legs and increased pain. She was seen by Drs. Holland and Waters, evaluated and was again released. *Id.* at 162, 45 P.3d at 818. Sometime later, the patient returned to her home state of Washington where she was seen and evaluated by way of an MRI and

found to have an injury to her spine at T7 which had not been addressed by the health care providers in Boise. She was taken to surgery, but they were unable to restore the damage and she was rendered a paraplegic. *Id.*

The patient filed suit against St. Alphonsus as well as Drs. Holland and Waters. The defendants filed various motions for summary judgment. In opposition to those motions, the patient filed the affidavits of her experts, Drs. Mengert and Stump, however the district court found the affidavits lacking foundation and granted summary judgment to the defendants. *Id.* at 164, 45 P.3d at 820. On appeal, the *Dulaney* Court restated the applicable community standard of care as defined in Idaho Code § 6-1012 as well as the requirements of Rule 56(e). *Id.* (citations omitted). The court again confirmed the requirement that "the admissibility of expert testimony is an issue that is separate and distinct from whether that testimony is sufficient to raise genuine issues of material fact sufficient to preclude summary judgment." *Id.* at 163, 45 P.3d at 819 (citing *Kolln v. St. Luke's Regional Medical Center*, 130 Idaho 323, 940 P.2d 1142 (1997)).

The plaintiff's experts in *Dulaney* were out-of-area experts who had attempted to familiarize themselves with the local standard of practice by inquiring of a local specialist. *Dulaney*, 137 Idaho at 164-165, 45 P.3d at 820-821. Dr. Mengert was an emergency room physician from Seattle. He contacted Dr. Scott Smith, a physician from Boise who was board certified in both emergency and internal medicine, however, Dr. Smith was working at the time as an internal medicine physician at the Boise VA hospital. *Id.* at 165, 45 P.3d at 821. In the course

of discovery, Dr. Mengert was deposed and he also submitted an affidavit in opposition to defendant Dr. Holland's motion for summary judgment. *Id.* at 166, 45 P.3d at 822. In his affidavit he stated in part: "That in my phone conversation with Dr. Scott Smith on or about April 18, 1999, Dr. Smith confirmed that there were no deviations between the standard of care applicable to emergency room physicians in Boise, Idaho on August 19, 1994, treating a patient with Anna Dulaney's symptoms and complaints, and the standard of care applicable to emergency room physicians practicing in Seattle, Washington treating similar patients on that date." *Id.*

Defendant Dr. Holland objected to Dr. Mengert's affidavit and contended it was conclusory, lacked foundation and contradicted his prior deposition testimony. The district sustained the objection and on appeal this Court affirmed, finding that the above quoted language from Dr. Mengert's affidavit was "conclusory" and did "not contain specific facts showing that Dr. Smith had knowledge of the standard of care for emergency room physicians in Boise" in 1994. *Id.* Similarly, Dulaney had failed to lay an adequate foundation for Dr. Mengert's deposition testimony that he had knowledge of the local standard of practice applicable to Dr. Holland. *Id.*

Dulaney's other expert, Dr. Stump, was a neurologist practicing in Washington. In an attempt to familiarize himself, he spoke with Dr. Bruce Adornato, a neurologist who previously practiced in Boise in the late 1980's to mid-1990's. *Id.* at 167, 45 P.3d at 823. Dr. Stump was also deposed regarding his discussion with Dr. Adornato during which deposition it was discovered that the discussion did not involve the standards of care for emergency room

physicians or orthopaedic surgeons, the specialties of the two defendants at issue in the case. *Id.* at 167-168, 45 P.3d at 823-824. The district court sustained the defense objection as to the foundation for Dr. Stump's opinions since the deposition testimony demonstrated that Dr. Stump had not adequately familiarized himself with the applicable standards of practice regarding the specialties of the two defendants. *Id.*

After the district court had granted the defense motion for summary judgment, Dulaney moved for reconsideration supported by a supplemental affidavit of Dr. Stump. *Id.* at 169, 45 P.3d at 825. Dr. Stump stated in his supplemental affidavit:

> 3. I spent approximately 20 minutes on the telephone consulting with a qualified orthopedic physician that is familiar with the standard of care in Boise, both now and in 1994. This doctor is a full professor of orthopedic medicine at a major university. He has trained orthopedic physicians that presently practice in Boise, as well as in other locales around the country. This doctor has maintained personal and professional relationships with physicians in Boise, and in other locations around the country. He has continued to teach and lecture throughout the country, and in Boise.
>
> 4. This physician has advised that the standard of orthopedic care is the same in Boise as it is in all major metropolitan areas in the United States. Boise physicians are of equal training and caliber as they are elsewhere in this country. Based upon our discussion, he advised (and I determined and confirmed my understanding) that the standard of care in Washington in 1994 was the same as the standard of care in Idaho at the same time.

Id.

Despite Dr. Stump's additional efforts to communicate with an anonymous physician, the court determined that Dr. Stump's supplemental affidavit was not admissible because "it did not allege specific facts showing that the anonymous professor was familiar with the standard of care for orthopaedic surgeons in Boise in August 1994." *Id.* Contrary to the arguments advanced by the Bybees in the case at bar, due to the lack of a specific factual showing in Dr. Stump's affidavit, the *Dulaney* court never specifically addressed the issue of whether the use of an anonymous physician would be acceptable method for an out-of-area physician to inquire as to the local standard of care. *Id.* This Court, did however give some indication that such a method would be problematic, as it went on to state that the anonymous "professor's conclusory statement [contained in Dr. Stump's supplemental affidavit] that he [the anonymous professor] was familiar with the standard of care in Boise in 1994 is simply not sufficient." *Id.*

b. The use of an anonymous consultant is not a permissible way for an out-of-area expert to familiarize himself with the local standard of practice.

With the *Dulaney* background in mind, we turn to the facts of this case and the supplemental affidavit of Dr. Osborn which stated, in part, as follows:

> 4. I have spoken with a board certified cardiologist who maintained a clinical practice in Idaho Falls, Idaho during the 2007-2009 time frame about the standard of care in prescribing Amiodarone in Idaho Falls and Pocatello. From my conversations and my own clinical practice in Pocatello during that time frame, I am familiar with the standard of care for cardiologists in prescribing Amiodarone in both Idaho Falls as well as Pocatello.

R. Vol. II, p. 229, ¶ 4. Dr. Gorman contends that the use of an anonymous or secret consultant physician by an out-of-area expert in a malpractice case is incapable of fulfilling the well settled foundational requirements for admissibility per Rule 56(e) and Idaho Code § 6-1012 and therefore should not be allowed by this Court. These foundational requirements which were noted in *Dulaney*, include Rule 56(e) which "imposes additional requirements upon the admission of expert medical testimony submitted in connection with a motion for summary judgment. The party offering such evidence must show that it is based upon the witness' personal knowledge and that it sets forth facts as would be admissible in evidence. The party offering the evidence must also affirmatively show that the witness is competent to testify about the matters stated in his testimony. Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e)." *Dulaney*, 137 Idaho at 164, 45 P.3d at 820 (citations omitted). In addition, the *Dulaney* court reaffirmed the community standard of care as defined Idaho Code § 6-1012 as being: (a) the standard of care for the class of health care provider to which the defendant belonged and was functioning, taking into account the defendant's training, experience, and fields of medical specialization, if any; as such standard existed at the time of the defendant's alleged negligence; and (c) as such standard existed at the place of the defendant's alleged negligence. *Id.*

Applying these requirements to the "secret or anonymous consultant" scenario demonstrates why it will always fail to comply with the foundational requirements necessary for

admissibility. The personal knowledge of the out-of-area expert cannot be verified without knowledge of the identity of the local familiarizing consultant. The district court would be forced to deal with an entirely unverifiable issue contained within the out-of-area expert affidavit on the very key foundational issue as to what he/she has done to acquire actual knowledge of the local standard of health care practice. There are no circumstantial guarantees of trustworthiness involving an unknown person and once the party moving for summary judgment has shifted the burden of proof, it is up to the responding party to come forward with specific facts, which if taken as true, would render the testimony admissible in evidence. *See Rhodehouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994); *see also Strode v. Lenzi*, 116 Idaho 214, 775 P.2d 106 (1989).

An expert testifying about the applicable standard of care in medical malpractice cases "must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time. The expert must also state how he or she became familiar with that standard of care." *Dulaney*, 137 Idaho at 164, 45 P.3d at 820; *Arregui v. Gallegos-Main*, 153 Idaho 801, 291 P.3d 1000 (2012). Without knowing the identity of the anonymous consultant, Dr. Osborn is unable to state in his affidavit "how he became familiar with the standard of care" applicable to Dr. Gorman.

The unique, but required role of the familiarizing physician serves as the only check and balance available for the court to ensure that the dictates of Idaho's statutory scheme are being fulfilled. By relying fully upon the accuracy and validity of the familiarizing physician

where an out-of-area expert is involved, this represents the only way the district court can arrive at the conclusion as to whether the defendant health care provider is truly being held to the community standard for the class of health care provider to which he/she belonged and was functioning taking into account his/her training, experience and fields of medical specialization. *See* I.C. § 6-1012. It is the job of the familiarizing physician to impart actual knowledge to the out-of-area expert so that the Court as the gatekeeper is assured that the foundation of what the out-of-area expert says about the local standard of health care practice is accurate and appropriate to present to a jury. Dr. Gorman contends that the use of an anonymous familiarizing physician cannot satisfy these foundational requirements consistent with the ruling of the district court.[3]

Idaho Code § 6-1012 is intentionally worded so that out-of-area expert physicians must take affirmative steps to ensure that their own opinions regarding the care rendered by the defendant health care provider are in line with the particular community standards of health care practice. For example, in many small towns in Idaho, it is frequently the case that physicians do not have access to specialists, do not have access to full time radiology and anesthesia services in local hospitals which also may not have access to expensive diagnostic equipment such as MRI machines or other sophisticated scanning or laboratory equipment. An out-of-area expert may

---

3 In an attempt to overcome the deficiency of the anonymous consultant, the Bybees argue that at the time of the summary judgment hearing, Dr. Osborn's affidavits had been filed, but the defendant had not yet deposed Dr. Osborn, suggesting that details about the anonymous cardiologist could have been revealed. Appellants' Br., p. 21. This argument, however, is irrelevant as the party opposing summary judgment is to submit the required evidence to create an issue of fact rather than claim the Defendant's must take a deposition in order to find the missing foundation that the Plaintiffs' counsel has failed thus far to submit.

opine that a certain imaging study should have been conducted, but what if that imaging study was not even capable of being conducted anywhere in that community? Without inquiring of a local specialist, an out-of-area physician would have no knowledge of these limitations or procedures for the given Idaho community which may or may not be at issue in the case. This is why this court has said "how an expert becomes familiar with the standard of care is a legal issue, not a medical issue." *See Ramos*, 144 Idaho at 38, 156 P.3d at 539.

Dr. Gorman contends that it would be impossible for an out-of-area expert to comply with the foundational requirements of Idaho Code § 6-1012 by using an anonymous informant since the district court has no basis or way of knowing his/her identity, background, training and experience for the time and place in question. These are required foundational areas of inquiry and without such information, the district court, as well as the defendant, are unable to verify the foundation of the out-of-area expert's opinions. R. Vol. II, p. 417. As such, the affidavit of Dr. Osborn did not comply with the foundational requirements of Rule 56(e) and Idaho Code § 6-1012 and was properly ruled inadmissible within the discretion of the district court.

c. Regardless of whether it would be permissible to utilize an anonymous consultant it was not an abuse of discretion for the district court to conclude that the limited description of what Dr. Osborn discussed with the unknown consultant in this case was insufficient to lay an adequate foundation for his opinions.

In the event this Court concludes that the use of an anonymous physician can be employed and still comply with the admissibility requirements of Rule 56(e) and Idaho Code §

6-1012, the affidavit of Dr. Osborn still lacked adequate foundation. An out-of-area expert must consult with a local specialist per Idaho Code § 6-1012 in order to learn and confirm the local standards of practice associated with the specific medical issues in the case including what types of specialists, equipment and facilities are available and what the habits and customs are for the specific specialty provider at issue within the medical community for the medical issues at hand. "In a medical malpractice case, it must be shown that the expert possesses sufficient knowledge of the specific procedures used by the defendant physician as the alleged malpractice." *Arregui v. Gallegos-Main*, 153 Idaho 801, 809, 291 P.3d 1000, 1008 (2012) (citing *Suhadolnik v. Pressman*, 151 Idaho 110, 115–16, 254 P.3d 11, 16–17 (2011)).

The specific medical issues in this case involve the local habits and customs in Idaho Falls in 2007 for cardiologists regarding the prescriptions used for treatment of paroxysmal atrial fibrillation, the length of those prescriptions and the manner and method by which patient follow up is scheduled in the community. These are the key issues in this case and there is no indication in Dr. Osborn's affidavits that the anonymous consultant he spoke with was provided with any information about this case or asked about the local standards associated with any of these questions so as to impart the required actual knowledge for purposes of laying a foundation for Dr. Osborn's opinions. Without this information, regardless of the identity of the familiarizing physician, Dr. Osborn's affidavit fails to "allege specific facts showing that the anonymous"

physician was familiar with the standards of practice applicable to Dr. Gorman in Idaho Falls in 2007. *Dulaney*, 137 P. 3d at 169, 45 P.3d at 825.

In his supplemental affidavit, Dr. Osborn states simply that: "I have spoken with a board certified cardiologist who maintained a clinical practice in Idaho Falls, Idaho during the 2007-2009 time frame about the standard of care in prescribing Amiodarone in Idaho Falls and Pocatello." R. Vol. II, p. 229, ¶ 4. He then concludes from this conversation and his own "clinical practice in Pocatello" that he is "familiar with the standard of care for cardiologists in prescribing Amiodarone in both Idaho Falls as well as Pocatello." *Id.* There is nothing within Dr. Osborn's affidavit which demonstrates that he acquired or confirmed actual knowledge regarding the standards of care at issue in this case as a result of his discussion with the anonymous physician. As outlined above, there is nothing about the background, training and experience of the so-called familiarizing physician which is stated in Dr. Osborn's affidavit such that the district court could reasonably conclude he knew the local standard of practice applicable to Dr. Gorman.

Because the liberal construction and reasonable inferences standard does not apply when deciding whether or not testimony offered in connection with a motion for summary judgment is admissible, "such meager information is insufficient," and the district court recognized this deficiency. See R. Vol. II, p. 417; *Arregui*, 153 Idaho at 809, 291 P.3d 1008. As a result, the district court did not abuse its discretion in deeming the affidavit inadmissible regardless of the use of the anonymous physician. Accordingly, the district court reached its

decision by application of the governing legal standards and through the exercise of reason and the decision was within the boundaries of the district court's discretion. Therefore, the district court did not abuse its discretion in holding Dr. Osborn's affidavits inadmissible, as they lacked the necessary foundation.

VI.

RESPONDENT IS ENTITLED TO ATTORNEY FEES ON APPEAL PURSUANT TO IDAHO CODE § 12-121 AND I.A.R. 41(A).

Idaho Rule of Civil Procedure 54(e)(1) governs the award of attorney fees. It states:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

"Idaho Rule of Civil Procedure 54(e)(1) 'creates no substantive right to attorney fees, but merely establishes a framework for applying I.C. § 12-121.'" *Newberry v. Martens*, 142 Idaho 284, 292, 127 P.3d 187, 195 (2005) (citing *Huff v. Uhl*, 103 Idaho 274, 277 n.1, 647 P.2d 730, 733 n.1 (1982)).

According to the Idaho Supreme Court:

> Attorney Fees on appeal are appropriate under that statute [Idaho Code § 12-121] on if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. Where an appeal turns on the question of law, an award of attorney fees under this section is proper if the law is well settled and the appellant has made no substantial shows that the district court misapplied the law.

Wait v. Leavell Cattle, Inc., 136 Idaho 792, 799, 41 P.3d 220, 227 (2001) (citation omitted).

Dr. Gorman contends that the case authority interpreting Rule 56(e) and Idaho Code §§ 6-1012 and 6-1013 specifically define a "community" and discuss the steps an out-of-area expert must take in order to sufficiently familiarize himself or herself with the local standard of practice. The actions of the Bybees in disregarding the specific requirements of the above statutes and extensive case authority interpreting them resulted in a foundationally defective and therefore inadmissible affidavit despite the presence of well-established Idaho case authorities regarding summary judgment requirements in medical malpractice cases.

Based on the record before the Court, Dr. Gorman contends the Bybees have unreasonably pursued this appeal and have failed to establish a credible misapplication of the law by the district court. In light of the substantial expenses incurred as a result of this undertaking, Dr. Gorman respectfully requests that he be awarded attorney fees pursuant to Idaho Code § 12-121 and I.A.R. 41(a).

VII.

CONCLUSION

The district court properly concluded that the community in question was Idaho Falls and not Pocatello or eastern Idaho. Dr. Osborn's affidavits demonstrate that he is an out-of-area physician. His affidavit is deficient because it lacks foundation as to his knowledge of the local standard of practice applicable to Dr. Gorman based both on the conclusory nature of the affidavit and based on his reliance of anonymous consulting physician. There was no admissible evidence before the district court in order to verify that Dr. Osborn actually consulted with a cardiologist in Idaho Fall or that the anonymous physician was is familiar with the standards of health care practice applicable to Dr. Gorman in order to comply with the foundational requirements of Rule 56(e) and Idaho Code §§6-1012 and 6-1013. The district court therefore did not abuse its discretion and properly granted Dr. Gorman's motion for summary judgment. Dr. Gorman therefore respectfully requests this Court affirm the district court's grant of summary judgment and that he be awarded costs and attorney fees for defending against this appeal.

DATED this 16th day of October, 2013.

QUANE JONES McCOLL, PLLC

By _____
Terrence S. Jones, Of the Firm
Attorneys for Defendants/Respondents

QUANE JONES McCOLL, PLLC

By_____
Erin C. Pittenger, Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2013, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF by delivering the same to each of the following, by the method indicated below, addressed as follows:

G. Lance Nalder
NALDER LAW OFFICE, P.C.
591 Park Avenue, Suite 201
Idaho Falls, ID 83402
Telephone: (208) 542-0525
Fax: (208) 542-1002
Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand-Delivered
[ ] Overnight Mail
[X] Facsimile: (208) 232-1900

_____
Erin C. Pittenger